CONFERENCE

CONFERENCE ON THE 30TH ANNIVERSARY OF THE UNITED STATES SUPREME COURT'S DECISION IN *GIDEON v. WAINWRIGHT*: *GIDEON* AND THE PUBLIC SERVICE ROLE OF LAWYERS IN ADVANCING EQUAL JUSTICE

HOSTED BY THE CONSORTIUM FOR THE NATIONAL EQUAL JUSTICE LIBRARY AND THE WASHINGTON COLLEGE OF LAW OF THE AMERICAN UNIVERSITY

THE AMERICAN UNIVERSITY, WASHINGTON, D.C.

INTRODUCTION

On March 18, 1993, the Consortium for the National Equal Justice Library, comprised of the American Bar Association, the National Legal Aid and Defender Association (NLADA), and the American Association of Law Libraries, along with the Washington College of Law of The American University presented a program to commemorate the thirtieth anniversary of the landmark Supreme Court case, *Gideon v. Wainwright*. *Gideon* established that any indigent criminal defendant prosecuted in a state court is entitled to legal representation provided by the state.

In addition to celebrating the thirtieth anniversary of the *Gideon* decision, the program introduced the National Equal Justice Library. This new institution has as its honorary co-chairs Justice William J. Brennan, Jr., the Honorable Sargent Shriver, and former Senator Warren Rudman. It is to be housed at the Washington College of Law and will serve as a resource for the study and advancement of legal representation of those unable to afford counsel. When fully operational in the Washington College of Law's new law center, the

National Equal Justice Library will contain a comprehensive collection of materials, including unpublished correspondence and memoranda, relating to the development of legal services for Americans who cannot afford to hire an attorney.

The program was hosted by Elliott Milstein, Dean of the Washington College of Law, and moderated by Richard Wilson, Clinical Professor of Law at the Washington College of Law. Justice William J. Brennan, Jr. served as an honored guest throughout the proceeding. Earl Johnson, Jr., Justice of the California Court of Appeal and President of the Consortium for the National Equal Justice Library offered introductory remarks. Following Justice Johnson were remarks by Brooksley E. Born, Chair of the Pro Bono Committee of the firm of Arnold & Porter, which served as pro bono counsel for petitioner Clarence Earl Gideon. E.G. Marshall, an actor and star of the television series, "The Defenders," offered a salute to Justice William Brennan for his many contributions to the goal of equal justice for all. Anthony Lewis, a columnist for *The New York Times* and author of *Gideon's Trumpet,* delivered the keynote address, sharing anecdotes about Clarence Gideon and hailing the great work of the many lawyers working for equal justice.

After Lewis' address, a panel of four provided recollections, viewpoints, and discussion about the right to counsel established by *Gideon.* Abe Krash of Arnold & Porter and Professor John Hart Ely, Professor of Law at Stanford University, discussed their experiences working on the case with the late Abe Fortas, counsel for Clarence Gideon. Bruce R. Jacob, Dean of Stetson University College of Law, shared his views as counsel for the State of Florida in the *Gideon* case. Finally, Angela Jordan Davis, Director of the Public Defender Service in the District of Columbia, presented her views on the current state of Public Defender Services across the United States.

The tone of the program was both celebratory and reflective, as the participants praised the legacy of the *Gideon* decision but cautioned that much is left to be done in securing adequate legal representation for the poor. There was great hope among the participants that the National Equal Justice Library will provide legal scholars and practitioners with the necessary tools to continue the fight for equal justice for the disenfranchised. The writings of those who have come before, attempting to establish programs to help the underprivileged, will be preserved so that those who follow in their footsteps can learn from their experiences.

PROCEEDINGS

DEAN MILSTEIN: Ladies and gentlemen, all rise for Justice William Brennan. And now we begin the program. (A film clip from GIDEON'S TRUMPET is shown.)

DEAN MILSTEIN: I am Elliott Milstein, the Dean of the Washington College of Law of The American University.

On March 18th, 1963, the Supreme Court held that the constitutional right to counsel in criminal cases extended to the poor, and that states had an obligation to provide counsel in felony cases for defendants who could not afford to hire one. Today we gather to celebrate the work of the many people who worked on the *Gideon* case, but also the many other lawyers both before and after *Gideon* who have spent their time, energy, intellect, and ingenuity continuing the struggle to provide equal justice. Through their work in public defender offices, legal aid agencies, legal services programs, clinical legal education programs, and the pro bono programs of private law firms, thousands of lawyers have contributed to the effort and today we salute them.

What a wonderful day for the Washington College of Law and The American University. We are deeply honored by having attracted to this occasion so many distinguished guests. If I were to recognize them all, we would have no time for the program. We have already noted the presence of Justice Brennan, and we will have another opportunity to pay him tribute later in the program. I would also like to acknowledge the presence of President Joseph Duffy of The American University, and many other distinguished guests, many of whom will be introduced to you later.

We are enormously, enormously proud that we have been named the Host Institution for the National Equal Justice Library and that our new building, which we expect to occupy in the Spring of 1995—or some other time—will be the home for this important resource. The Library, which is a project of the American Bar Association, the National Legal Aid and Defender Association, and the American Association of Law Libraries, will be an archival collection of materials dealing with civil and criminal legal aid as it has been provided by agencies, programs, individual lawyers, and private lawyers. It will be both a place to study and research, as well as a museum commemorating those who have worked so selflessly in this ongoing fight.

It is fitting that this law school was chosen, as its history was written in the crucible of the fight for equal rights. Our school was founded by two women in 1896, Ellen Spencer Mussey and Emma Gillette.

They started a law school to ensure that women as well as men would have the opportunity to enter the legal profession, and today we carry on that tradition in our law school in many ways. We have outstanding clinical programs: the Women and the Law Program; the Center for Human Rights and Humanitarian Law; our teaching, our scholarship, the pro bono service of our faculty and our students. The work of our alumni keep this law school deeply committed to and involved in ensuring that the promise of "Equal Justice for All" becomes a reality. So on behalf of our president, our provost Milton Greenberg, my colleagues on the faculty and staff of the law school, our students, our alumni, I welcome you to the celebration in this program.

It is now my honor to introduce to you the person who has been the driving force behind the creation of the National Equal Justice Library. Justice Earl Johnson, Jr., Associate Justice of the California Court of Appeal, is one of the towering figures in the legal services movement. Among the wonderful things he has done in his career, he was the Deputy Director of the Neighborhood Legal Services Program in the District of Columbia, where he represented individual clients in civil matters. In 1965 he was appointed Deputy Director of the Legal Services Program which was then part of the Office of Economic Opportunity, and he later the next year became its Director. During his tenure, the Program grew from just a mere idea into 850 neighborhood law offices staffed by 2000 lawyers serving 1 million clients a year. Since I and six of my colleagues served in those programs, we are particularly thankful for his legacy.

Justice Johnson served on the faculty of the University of Southern California Law School from 1969 to 1982, a time during which he was a key actor in the movement to establish the Legal Services Corporation. He has been on the bench since 1982. He has been the prime mover behind the National Equal Justice Library, served as chair of its founding committee, and now is president of the Consortium for the National Equal Justice Library. He is also the first major donor to the Library, as he and his wife established the Justice Earl Johnson, Jr., and Barbara Johnson Collection of Materials on Legal Representation of the Poor in Europe and Canada.

Justice Johnson.

Introductory Remarks by Justice Earl Johnson, Jr.

JUSTICE JOHNSON: Justice Brennan, Mr. Lewis, honored guests, ladies and gentlemen: on behalf of the Consortium for the National Equal Justice Library, I want to welcome you to this program

commemorating the 30th anniversary of the decision of the Supreme Court in *Gideon v. Wainwright.* Just as nothing has been the same in relations between the races since *Brown v. Board of Education* was issued by the Supreme Court in 1954, nothing has been the same in relations between the poor and the American legal system since March 18th, 1963. The *Gideon* opinion focused the nation's attention on the governmental responsibility to provide legal counsel, and thus equal justice, to low-income Americans in a way it never had been before or since.

All of which is to say that in commemorating the Supreme Court's decision in *Gideon v. Wainwright* we not only celebrate that decision, but we also mark the beginning of the most creative two-year period in the entire history of legal representation of the poor in the United States. In a sense, *Gideon* was like a wake-up call that set forces in motion on a dozen fronts. In a span of time equivalent to that between today's program and the anticipated opening of the National Equal Justice Library in early 1995 was created the entire foundation of our present-day systems of government-supplied counsel for the poor in both criminal and civil cases. In those two years came into existence the OEO Legal Services Program, the Federal Criminal Justice Act, the National Defender Project, and literally scores of public defender and organized offender programs in state courts around the country.

The idea of the National Equal Justice Library emerged from two concerns several of us shared. One concern was that we were in danger of losing much of the history of that creative surge which followed in the wake of *Gideon* 30 years ago. We were haunted by what happened to the vital papers of Claire Shortridge Foltz, the first woman lawyer in California and the mother of the public defender movement. She wrote and lobbied through the very first Public Defender Act in the country, and later promoted similar legislation in a dozen states. But when she died earlier in this century, all—and I mean all—of her correspondence and memos and other papers were thrown out by her heirs who had no appreciation whatsoever of their historical value. We could see the danger that other private papers of similar historical importance might be discarded in coming years as people changed jobs, or moved, or retired—just because there was no place willing and able to collect and to preserve those documents. By the way, we were just as worried about losing the papers of critics and outright opponents of the programs which have developed as we were about losing the papers of supporters, because we wanted a complete and accurate history, not a glorification of

history. And it has been a history of struggle as much as it has been a history of achievement.

Our other concern was that few of the thousands of lawyers involved in civil and criminal representation programs were even aware of the rich heritage of the movements of which they were a part. We felt a need to instill a knowledge and an appreciation of that history, and a sense of the inspiring mission they were fulfilling among those who were laboring day to day on the legal problems of the poor. Now this was the initial impetus for the library: the preservation and dissemination of the history of legal representation of the poor in this country.

However, as planning proceeded, the mission quickly broadened. We came to realize there was a great need among policy makers in the field of legal services for a working research library which held not only historical private papers but which housed under one roof everything that has been written, studied, planned, or considered in this field, a place where could be found all the books and articles, all the legal need studies, all the legislative hearings and reports, all the Bar Association proposals, and everything else bearing on the organization, financing, and delivery of legal representation to those unable to afford their own legal counsel. Moreover, because the United States is not the only country which has been working on these problems, and not the only country which has good ideas and valuable information to contribute, a library where could be found comprehensive materials on government-funded legal representation in other nations, as well.

So that became the enlarged dream for what is now the National Equal Justice Library: a repository of the past, but also a resource for enriching the present and planning a better future. We approached the American Bar Association, the Association of American Law Schools, and the American Association of Law Libraries about their willingness to participate along with the NLADA in a joint committee to establish the as-yet unnamed library. With the help of Bob Raven, then the immediate past-president of the ABA, and Stan Chaurin, the president, we managed to gain the approval of the ABA Board of Governors, along with a small seed grant out of the ABA budget.

We had, as it turned out, another important ally within the ABA. That was Harriet Ellis, who at that time was a key staff person in the Association. She was so taken with the idea of the Library, she personally undertook to write the proposal which was submitted to the Board of Governors. As many of you know, Harriet Ellis now serves as the consultant for the National Equal Justice Library. What

you may not know is that this *Gideon* program was entirely her idea. She thought of it, lined up the principal speakers, and put the entire thing together. I think we all owe her a debt of gratitude for all she has done to make this day a reality. And that is the reason I would not let Harriet look at my speech before the session.

MS. ELLIS: Thank you. It was my privilege and a labor of love.

JUSTICE JOHNSON: Fairly early on in its deliberations, the Joint Committee decided it would be best if this library could be located in the Washington-Baltimore area. Among other reasons, we thought it was important that the library's materials be easily accessible to national policymakers. So we invited all the law schools in this area to apply to be the host institution for the library. All expressed real interest, although some had to bow out because they simply did not have the space or the ability to expand to accommodate the separate reading room and other facilities the National Equal Justice Library will require. Eventually, three law schools submitted detailed written proposals.

The Joint Committee dispatched a site selection subcommittee which spent nearly two full days visiting the three schools. They prepared an exhaustive report which the full Joint Committee pored over and debated for the better part of a day before deciding on the Washington College of Law. It was a difficult but nearly unanimous choice, and I might say, Dean Milstein, one which is looking better and better as time goes by.

While waiting for American University's new law building to come into existence, we have found many things to keep us busy. With the guidance of our pro bono counsel Philip von Mehren of Milbank, Tweed's Washington office, the Joint Committee organized into a Washington, D.C. nonprofit corporation called "The Consortium for the National Equal Justice Library, Inc." We also have begun collecting materials for the Library. We were especially heartened when the New York Legal Aid Society informed us that they will be donating the original records of the nation's first Legal Aid Society founded in 1876, the German Legal Aid Society, to the National Equal Justice Library. This German Legal Aid Society became the New York Legal Aid Society in 1890, which is the reason for the New York Society possession of the materials. As might be expected, these records are in German, not English, but you can be assured they will be well preserved and prominently displayed at the National Equal Justice Library.

We also recently acquired over twenty-five boxes of materials from the NLADA, essentially the entire history of that organization, and we

have also begun collecting materials for our international collection with over 150 volumes already received from the Canadian legal aid programs. Also of special interest is the Oral History Program we have started. So far we have conducted almost fifty videotaped interviews with individuals who have played important roles in the development of public defender and civil legal services programs. One of those interviews, by the way, was with the First Lady, Hillary Rodham Clinton, recounting her years as Chair of the Board of the Legal Services Corporation.

There was nothing like the National Equal Justice Library around thirty years ago. As someone who was involved in policymaking in this field at that time, I sorely wish there had been. I know how much I gained from reading Reginald Heber Smith's 1919 classic *Justice and the Poor.* But frankly that was about all there was available at that time.

Now we are in a new time, a more difficult time, a more complex time, a more sophisticated time. Not a time when people speak of rising expectations as they did in the 1960s, but a time when they tend to talk only about diminishing resources—or at least that is the perception. And yet, it is also a time of unrealized goals and unfulfilled needs and unrighted wrongs. Nowhere is this more true than in the field of legal representation of those unable to afford their own counsel. The civil legal services program in this country is only about half the size it was twelve years ago. Criminal defense is threatened on all sides and in many jurisdictions with budget cutbacks and budget cutoffs and restrictions of all sorts. If in this day and age you are to realize the ultimate goal of equal justice, fulfill the legal needs of those unable to afford their own counsel, and right the many wrongs the legal system currently inflicts on those without lawyers, you are, I am afraid, going to be required to be smarter, more knowledgeable, and more sophisticated than was required thirty years ago.

The National Equal Justice Library, with the knowledge base and intellectual resources it will supply (which would have been a help, admittedly, in the mid-1960s) has become, I fear, a necessity in the mid-1990s. So I ask you to help build that library, and then to use it well. Thank you.

I would now like to introduce the presidents of the three national legal organizations which founded the Joint Committee, and now the Consortium for the National Equal Justice Library. These three organizations still appoint the core of the Board of the Consortium. Without the far-sighted leadership of these three organizations who

could see merit in the idea of the National Equal Justice Library before it even had that name and was but a gleam in the eye of a half-dozen individuals, this library would never have happened. And, in all likelihood, this program honoring *Gideon v. Wainwright* likewise would not have been held. So, we owe them a lot.

First from the American Bar Association, its president Michael McWilliams of Baltimore, Maryland, who is a long-time supporter of equal justice for all Americans. Then from the Association of Law Libraries, its president Mark Estes of Denver. Finally, last but certainly not least, from the National Legal Aid and Defender Association, its president Lonnie Powers of Boston.

We also have present with us a number of members of the Board of the Consortium. I am going to ask them to stand and be recognized *en masse.* First, Jim Milles from the American Association of Law Libraries. Would you please stand. Jim Neuhard from the National Legal Aid and Defender Association. Victor Geminiani from the National Legal Aid and Defender Association. I don't know if Richard Fishman is here or not. Pat Kehoe, The American University representative on the Board.

Thank you very much. They put in a lot of hard work, I can tell you, on this.

Also with us is one of the grand old men of the American Bar Association. He is probably the mentor to more of the people involved in legal services and public defender work and generally in work to help advance the goal of equal justice than almost anyone alive: Chesterfield Smith from Florida. Chesterfield also was a president of the American Bar Association more years ago than he likes to admit.

You will find listed in your program a host of organizations and entities whose staffs and members have devoted themselves to the goal of Equal Justice symbolized by *Gideon v. Wainwright,* and who have joined with the National Equal Justice Library in commemorating the 30th anniversary of this historic decision. The representatives of these organizations and entities are all seated in the front few rows here in front of the podium. I am not going to introduce each one of them, obviously, but we who are involved in the National Equal Justice Library welcome their participation in this program and with the library itself. After all, among them the histories of these organizations and entities is the national history of the struggle to bring equal justice to all Americans, and we look forward to receiving their materials for inclusion in the National Equal Justice Library.

It is now my great pleasure to recognize on behalf of the National

Equal Justice Library the distinguished Washington law firm of Arnold & Porter. We honor them not only for the marvelous representation they provided to Clarence Earl Gideon in the United States Supreme Court, but for the firm's long tradition of pro bono work on behalf of low-income Americans both before and after *Gideon v. Wainwright.* The library is deeply delighted to thank Arnold & Porter for its donation of $25,000 to establish the first law firm donated "Named Collection" within the National Equal Justice Library. When the library's physical facility is available, the Arnold & Porter collection of course will be permanently and appropriately recognized on the walls and within the documents of that library. In the interim, however, we have prepared a modest plaque which honors both the firm's commitment to pro bono and its contribution of the Arnold & Porter collection for the National Equal Justice Library.

Appropriately, we have asked the chair of the firm's pro bono committee, Brooksley Born, who also happens to be a member of the Board of the National Equal Justice Library, to accept this award and, as well, to speak about the pro bono role of the private bar. It is appropriate not only because of her present position within the firm and with the library, but because of Brooksley's own extensive pro bono efforts over the past quarter century. Among probably a hundred other things, she helped found the Center for Law and Social Policy; was instrumental in establishing the Woman's Rights Project, now the National Women's Law Center; chaired the Individual Rights and Responsibilities Section of the ABA; was a board member of the National Legal Aid and Defender Association; and for the past several years has been a member and continues to be a member of the ABA Board of Governors.

I am going to ask Brooksley to come forward. I will now attempt to read the inscription on the plaque: "The Consortium for the National Equal Justice Library honors the law firm of Arnold & Porter, pro bono counsel for petitioner Clarence Earl Gideon in *Gideon v. Wainwright,* for its long-standing continuing commitment to public service by lawyers in the cause of Equal Justice for All, and as the first law firm "Named Collection" donor to the National Equal Justice Library." The name of that collection is:

> "The Arnold & Porter Collection of Historical Materials on *Gideon* and other Constitutional Developments affecting the Right to Counsel in Criminal Cases in Memory of Abe Fortas."

MS. BORN: Thank you very much.

Remarks of Brooksley E. Born, Esq.

Thank you very much. Earl, Justice Brennan, and Dean Milstein, and colleagues and friends: Arnold & Porter is really delighted to give the first "Named Collection" to the National Equal Justice Library. The "Named Collection" is being dedicated to the memory of Abe Fortas. We feel that it is particularly significant to recognize Abe's contribution to the legal services movement today, the 30th anniversary of *Gideon v. Wainwright.*

In that case, Abe, through his pro bono representation of an indigent criminal defendant, established the right to counsel at state expense for poor criminal defendants. In so doing, he exemplified his own ideal of the lawyer as public servant. He had served as a government lawyer in the New Deal Administration of Franklin Delano Roosevelt, and when he left government service to be one of the founding partners of Arnold & Porter, he brought to the private practice of law the same spirit of public service that he had shown as a government lawyer. He believed that the practice of law was not merely a commercial venture involving service to paying clients, but was something more. It was service to the administration of justice and to the public as a whole.

In founding Arnold & Porter, Abe and his partners made it clear that there was a pro bono responsibility on the part of all private practitioners. Early on they established a policy that we still follow today: that every lawyer in the firm may spend up to 15 percent of his or her working time doing public service and pro bono legal services for the poor. Abe recognized that for a society to be governed by the rule of law, people had to have access to the courts for redress of their grievances, whether they were rich or poor, popular or despised. He also recognized, as all lawyers must, that to have true access to the courts one must have legal representation. Abe started a firm therefore which represented not only corporations and wealthy individuals, but also the indigent and the oppressed. One of our favorite stories at the firm, whether true or apocryphal, is about a cocktail party in the McCarthy era of the 1950s when another of our founding partners, Paul Porter, was approached by an irate person who said, referring to our pro bono program, "I understand your firm represents communists and rapists." Paul said, "That's right, we do. What can we do for you?"

Although Abe Fortas and Arnold & Porter had many pro bono cases in those early days, none so embodied Abe's beliefs about a lawyer's public service responsibility as *Gideon v. Wainwright.* By establishing a right to counsel for indigent criminal defendants, Abe

obtained recognition that the administration of criminal justice is a mockery without the legal representation of the defendant, for a system of justice such as ours which depends on the power of advocacy cannot operate fairly or well where the advocacy is all on one side. As Justice Black recognized in his opinion in *Gideon*:

> This noble ideal [of equal justice] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[1]

In the *Gideon* case, Abe Fortas played the noblest role of lawyers. He was an advocate for his client, and, at the same time, he enhanced the system of justice. Abe Fortas was indeed "Gideon's Trumpet." He let his golden voice ring forth, and the barriers to justice came down.

The National Equal Justice Library is dedicated to those in the legal profession like Abe, whether they are private practitioners or legal services lawyers or public defenders who have worked to fulfill society's promise of equal justice under law. That job is far from finished. There is a great deal of work to be done by all of us to assure access to justice in an era when less than twenty percent of the poor are obtaining needed civil legal services and when over-crowding and under-funding of the courts are barriers to access to justice. It is a time to remember that the vision and dedication and courage of one lawyer can make an enormous difference in the administration of justice. If each of us can look at the administration of justice with the fresh vision and the fresh view of Abe Fortas and step forward to do what is necessary to overcome the barriers to justice, what a difference we can all make. Each of us can be "Gideon's Trumpet" and bring the barriers down. Thank you.

JUSTICE JOHNSON: Now we come to another very special event on this program. The last time I stood at a podium with Justice William Brennan in attendance it was almost twenty-seven years ago: August 1966, at Airlie House Convention Center. My purpose then was to introduce Justice Brennan as the keynote speaker at the very first National Conference of the Project Directors of the newly created OEO Legal Services Program, in essence, the first poverty lawyers in the country. His speech was an inspiration to the 200-or-more legal services directors who heard him that night, just as his contributions on and off the bench have been an inspiration to all of us during the intervening twenty-seven years.

This afternoon, we are fortunate to have with us a legend to help us salute a legend. Justice Brennan's good friend, a distinguished

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1. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

actor, a former vice president of the American Judicature Society, a fellow of the American Bar Foundation, and the man who probably inspired more young people to become criminal defense attorneys than anyone alive, the star of what I still think is the best dramatic series ever produced about the law and lawyers, "*The Defenders.*" Of course I refer to E.G. Marshall.

Salute to Justice William J. Brennan, Jr., for His Many Contributions to the Goal of Equal Justice for All

By E.G. Marshall

E.G. MARSHALL: At the time that *Gideon* was first published, I exclaimed, "Wow!" I wrote to Abe Fortas asking him what turned the Court away from *Betts v. Brady*? Hugo Black wrote the dissent in that opinion, denying the right of counsel. Hugo Black wrote, of course as you know, *Gideon.* I asked Mr. Fortas how we could make this more known to the public. Could I help in any way? Also, what turned the tide on it? "Well," he said, "Anthony Lewis is writing a very good book, *Gideon's Trumpet*," and I said, "Wonderful." And Henry Fonda did a wonderful job as Gideon. So something was accomplished.

That August at a prayer breakfast, I sat at the head table with a man who has become a very dear friend of mine, William Joseph Brennan, Jr., and his dear wife, vivacious Mary Brennan. "I am in love with a man I never met," was the headline of a column, not in one of those supermarket tabloids—but in *The New York Times* by that marvelous writer Anna Quindlan, a page-mate of Mr. Lewis'—although, they never meet. Mr. Lewis is on Monday and Friday, and Anna is on Sunday and Wednesday. But that is one of the most notable things about Justice Brennan: love.

I was riffling through some of my old textbooks to find a quote to the effect that law is not written; law is not made; it is discovered. It just takes a clear eye, a keen mind, and a strong heart to bring it to the light of day. It was always there. We just couldn't see it until men like Justice Fortas and Justice Brennan and Justice Black came along. And now with this library, scholars, students, lawyers, judges, legislators, teachers, will be able to "access" the "discoveries" of the past and "input" the recent ones. All from one comprehensive source. This will save a lot of time. No more climbing through shelves. The National Equal Justice Library will be an important national resource.

I would like to quote from Laurence Tribe to make sure that I am saying something authentic and sensible: "What makes Justice

Brennan's accomplishments so remarkable and so timeless is that they created not a mere sandcastle to be washed away by the political vicissitudes of the Court's ebb and flow, but a well-founded legal edifice that will withstand constitutional tides for decades to come."[2]

My heart is filled with joy at this opportunity to join you in saluting one of the great Justices of our era, and with this blessing:

> May the road rise up to meet you.
> May the wind be always at your back.
> May the sun warm your face,
> And the rain fall gentle on your land.
> And until we meet again,
> May you rest in the palm of God's hand.

And I hope we are both here in 1995 for the opening, the ribbon-cutting ceremony.

Now I would like to read this plaque, if I may:

> For his many contributions to the goal of Equal Justice for All, as a member of the United States Supreme Court and as an intellectual and moral leader of this Nation, to be commemorated in the National Equal Justice Library a resource for the study and advancement of legal representation of the poor.

(E.G. Marshall presents the plaque to Justice Brennan.)

DEAN MILSTEIN: What a day! What I was going to say to our students is that you have heard biographies of some very distinguished lawyers, and I wanted to point out to you that each of them at some point started as a law student. But perhaps the most famous of them all, E.G. Marshall, never did. So there is a lesson there.

Our keynote speaker today is the distinguished journalist and columnist for *The New York Times*, Anthony Lewis. Mr. Lewis joined the Washington Bureau of the *Times* in 1955 to cover the Supreme Court, the Justice Department, and other legal matters. Among other things, he reported on the Warren Court and on the Federal Government's response to the civil rights movement. He won his second Pulitzer Prize in 1963 for his coverage of the Supreme Court. He was a Niemann Fellow and studied law at Harvard Law School and was for 15 years a lecturer at the Harvard Law School teaching a course on the Constitution and the press.

He is the author of three books. Most recently, *Make No Law: The Sullivan Case and the First Amendment.* His second book, *Portrait of a Decade,* was about the great changes in American race relations. Today, however, we are most interested in his wonderful book, I guess

2. Laurence Tribe, *Architect of the Bill of Rights*, A.B.A. J., Feb. 1991, at 47, 47.

his first book, *Gideon's Trumpet,* which I am sure most of you have read, or at least seen in its motion picture version.

Mr. Lewis.

Keynote Address

By Anthony Lewis

ANTHONY LEWIS: Dean Milstein, thank you. Justice Johnson, Ms. Born, Justice Brennan, ladies and gentlemen: What could be more moving than to celebrate the *Gideon* case today in the presence of Justice Brennan, the man who more than any other has given meaning to the theme of equality in our Constitution? Before saying a word about *Gideon,* I want to go back to a time that Ms. Born actually mentioned to my surprise and pleasure, the McCarthy period, the 1950s, when American society was afflicted by a great fear, the fear of communism. There was hysteria about security risks in government, about disloyal motormen on the New York subways, about supposed communists on *The New York Times.* People were driven from their jobs. Pilloried. Persecuted because someone said they were soft on communism.

I was a young reporter in Washington then on a paper that no longer exists but that deserves a plug—*The Washington Daily News*—and I wanted to find out what was happening. I sought out some of the victims of the security mania and found them through their lawyers. One lawyer who was of great help to me was a single practitioner, a friend and honored friend, Joseph A. Fanelli. One of the first firms I went to was Arnold, Fortas & Porter, as it was then. It had represented a young woman named Dorothy Bailey who lost her job in the federal civil service because someone said she was a security risk. Who the "someone" was, or exactly what the "someone" said, Ms. Bailey did not know because the system kept that information from her. Arnold, Fortas & Porter challenged that system as a denial of due process. They lost in the U.S. Court of Appeals here by a 2-1 vote in a divided panel. They took the case, *Bailey v. Richardson,* to the Supreme Court where the judgment was affirmed by an equally divided Court. The firm did all that without charging Ms. Bailey because the lawyers thought it was their duty to help challenge a system so unjust and so subversive of good government. When it was all over and they had lost, Dorothy Bailey was hired by Arnold, Fortas & Porter.

There were not many happy endings in that "scoundrel time"[3] for the victims of the Great Fear, but there would have been none—and there were some—without lawyers who were willing to take on difficult cases without hope of financial reward—indeed, at great potential personal cost. And by "cost," I mean both financial burden and the possibility, the very real possibility, rather implied in Ms. Born's nice story of Paul Porter's response, that lawyers who represented security risks, supposed security risks, would themselves be denounced as apologists for communism.

Ladies and gentlemen, the profession of law—perhaps it is necessary for some cold light here today—is not always so noble. The characteristic lawyer probably spends most of his or her days advising corporate clients, or carrying on some other activity that does not bring to mind a movie starring Katherine Hepburn and Spencer Tracy. But I am convinced that law is the critical profession in the American system, the one that from the beginning has breathed life into our constitutional promise of ordered freedom. In particular, lawyers have had the responsibility of trying to keep the promise that in this society the least powerful among us, the despised and rejected, will have the right to justice.

That was, of course, what the *Gideon* case was about. Clarence Earl Gideon was at the bottom of the pyramid of power in this country, an habitual petty criminal, penniless, worn out beyond his years; but when he made the claim that he could not get justice as a criminal defendant without the guiding hand of a lawyer, the Supreme Court of the United States decided in his favor. The right to counsel now is like motherhood, universally revered. Even as other rights of criminal defendants established at about the same time, 1963, as the *Gideon* case, even as those other rights are eroded by the current Supreme Court, the Court pays homage to the *Gideon* decision and says that it is fundamental and for keeps. But I wonder how much we really understand and accept the principle when we get below the abstraction, the generality? I will intrude here a personal story.

You have seen on the screen a little bit the beginning of the representation of Gideon's first trial for breaking and entering the Bay Harbor Pool Room in Panama City, Florida, the trial at which he was not represented by counsel. I attended the second trial, after he won his case in the Supreme Court, when he was entitled to a lawyer and he had a lawyer, one he chose himself, having rejected the kind

3. *See generally* LILLIAN HELLMAN, SCOUNDREL TIME (1976) (discussing communist hunting and blacklisting in 1950s).

offer of the American Civil Liberties Union to represent him. He was rather cantankerous, that Mr. Gideon. Then I watched this film being made. I had nothing to do with it, but the person who had written the script, was really the spirit of the film, David Rintels, asked me to come out and watch it being shot, and I did. They shot the scene of the second trial in a small courtroom south of Los Angeles.

Now in the first trial a taxi driver had been called by the prosecution, and he testified that he had picked Gideon up—that Gideon had telephoned him and asked him to come to be picked up at about two o'clock in the morning on the corner of the street just outside the Bay Harbor Pool Room which had been burgled.

The prosecutor asked the taxi driver, "Did Mr. Gideon say anything when he got in the cab?"

The taxi driver said: "Yes, he said, 'Don't tell anybody you picked me up.'"

The prosecutor said, "Thank you very much. That's all."

And the judge said, "Mr. Gideon, would you care to cross-examine"?

Well, as you know, he had no questions.

Here I was now in this old courtroom south of Los Angeles watching the second trial at which the lawyer who was appointed at Gideon's request to represent him, Fred Turner, was played by a young and a very able character actor named Lane Smith. The taxi driver was called by the prosecutor again, and he testified again that he picked Gideon up and Gideon had said, "Don't tell anybody you picked up me." And Lane Smith, playing Fred Turner—I had really forgotten all this; I actually watched the second trial, but I had forgotten it—Lane Turner said, "Had he ever said that to you before?"

And the taxi driver said: "Oh, yes. He said that to me every time I picked him up."

"Why?"

The taxi driver said: "I think it was some kind of woman trouble."

And Lane Smith, making this part up, walked over to the jury with a broad wink and said, "Well, we all know about that."

And the director said, "Cut."

And I turned to the person next to me and I said, "My God, it really makes a difference to have a lawyer, doesn't it?"

In a more serious sense, far more serious, we as a society I think have not fully understood and put into practice the true meaning of the *Gideon* decision. When I wrote *Gideon's Trumpet* thirty years ago, I was naive about the promise of equal justice. I assumed that our political system would vindicate the rights established in *Gideon v.*

Wainwright, but we are far from doing that, in my judgment.

Early this year *The American Lawyer* devoted an issue to portraying the reality of the justice we give to many indigent defendants in this country—and that is most criminal defendants, ladies and gentlemen, upwards of seventy percent. In Indianapolis, to take just one example, Bobby Houston was held in jail for nineteen months without ever being tried on the charge brought against him, child molesting. Four of those months were after the charge had been dismissed. Why? The public defender handling the case never told him about the dismissal, and never told the prison authorities. Nor would the lawyer accept collect calls from the prisoner about his case, for the understandable reason that public defenders in Indianapolis are given almost nothing for office expenses and routinely therefore reject collect calls.

That is one example of limitless ones in this country today. Inadequacies of counsel add up to a lot of skimped justice. I think the worst blot on the legal record is the quality of lawyers in capital cases. Too often, the quality is simply dismal. At the trial of defendants facing the death penalty, lawyers have been drunk, asleep, indifferent, grotesquely inexperienced. Later, on appeal or federal habeas corpus, volunteer lawyers come in to try to rescue convicted defendants, and they are frequently shocked at what they find in the record: that trial counsel did not do even a passable job. And of course by then it is really too late to correct that record.

The constitutional guarantee is of "competent counsel," but the contemporary Supreme Court has given that adjective so little meaning that it might just as well be omitted. Those who have tried unsuccessfully to litigate the issue of competence of counsel speak of the "spoon test." If you hold a spoon up to a lawyer's mouth, a defense lawyer's mouth, and it shows he is breathing, he is competent. Moreover, as this audience will well know, a majority of the Court has for some years been carrying out an agenda to restrict—indeed, all but eliminate—the last hope of capital defendants to vindicate their rights: federal habeas corpus.

The judges who handle those cases, the district judges, federal district judges, are reluctant to upset the decisions of state courts. But an American Bar Association study showed that they have done so in forty percent of capital cases that come to them, a grim testament to the reality that many men and women have been convicted and sentenced to death at trials at which they were represented by lawyers who lacked the needed skill and dedication, or lacked the needed resources which are often denied by state assistance. We have had a

dramatic reminder lately of how capital cases can go wrong. I am sure most of you saw the story.

Walter McMillian, a black man from Monroeville, Alabama, was accused of murdering a white woman. Monroeville happened to be the home of Harper Lee, but the real-life story was not like the triumph of justice over racism in Lee's novel *To Kill a Mockingbird.* Immediately after his arrest—before trial—McMillian was sent to Alabama's death row. At trial a dozen witnesses testified that he was home on the day of the murder, and there was no physical evidence against him. The jury nevertheless found him guilty—but it sentenced him to life imprisonment. The judge, as Alabama law entitled him to do, changed the sentence to death. His lawyers tried five times by different means to save him. Much evidence of improper police and prosecution behavior was found. *Sixty Minutes* told the story. Finally, two or three weeks ago, prosecutors joined in asking for his release, and the Alabama Court of Criminal Appeals threw out McMillian's conviction. When a reporter asked McMillian whether the decision restored his faith in the system, he had the courage to answer, "No, not at all."

It is lawyers who have the burden of maintaining faith in our system of justice, but then I do not think that should be viewed as a "burden." It is a privilege: an honor that gives meaning to their professional life. In celebrating the *Gideon* case, we should not forget the part that lawyers played in it. The briefs and arguments were exceptional, a testimonial to what the profession can do. We have here today Abe Krash and John Hart Ely, who assisted Abe Fortas in the representation of Clarence Earl Gideon before the Supreme Court and in the scholarly expounding of the right to counsel as a principle. We have Bruce Jacob, who represented the State of Florida with honor and distinction. And we should not forget the lawyers who extraordinarily persuaded twenty-three states to ask the Supreme Court in a brief amicus to require counsel for indigent criminal defendants. They included the Attorney General of Massachusetts, Edward McCormack, and his assistant, Gerald Berlin, and the Attorney General of Minnesota, Walter F. Mondale.

But we should be thinking today about more than the rights of criminal defendants, even though that is the reason for our being here. Lawyers have a great part to play, too, in assuring other kinds of justice. I think of the lawyers who defended witnesses before communist-hunting congressional committees and represented so-called "security risks"; of lawyers who represent the poor in civil cases today under the out-manned, out-gunned Legal Services Corporation.

I think of the Yale students and their Professor, Harold Koh who have fought so hard in the last year against the Bush administration and despite promises of the Clinton administration to establish that Haitians have a right to make a case for political asylum before being sent back to the murderous regime in Haiti. Ladies and gentlemen, what Justice Holmes said early in this century is just as true today: "It is possible to live greatly in the law."

Now I was going to stop there, but it seemed to me that on this occasion I might say another word about the person who really brought us here: Clarence Earl Gideon. I am often asked, "What ever happened to him? Did he go back to a life of crime? Was he ever in trouble again?" The answer is that, so far as I know, and I think I do know, he only ever got in trouble one more time. He went to the Kentucky Derby, and he didn't win. He was across the river in one of those Ohio River towns, and he was arrested for vagrancy. He was called before the judge or the magistrate.

"How do you plead, Mr. Gideon?"

"Well, before we have this case, Your Honor, I wonder if you'd have a look at this?" And he hands him a copy of my book.

"Now," the judge said, "it is very interesting. I don't have time to read it right now, but you spend the night in the lockup and I'll see you tomorrow, Mr. Gideon."

The next day he comes into court. The judge says, "Well, Mr. Gideon, I've read the book, and I must say I'm delighted and honored to have met you. It is wonderful to know you are right here in my courtroom. Actually, I was just going to let you go. But if I understand the case correctly, it only holds that people charged with 'serious' crimes are entitled to free counsel if they're poor. But if you would like to see whether the Supreme Court would extend that to petty crimes like this one—instead of letting you go, I will sentence you to six months in jail and you can take it on up."

"Well, if it's all the same to you, Judge. . . ."

That is the last thing I heard about Clarence Earl Gideon until, while I lived in London in 1972, I received a letter from Abe Fortas that contained a funeral notice from Hannibal, Missouri. The funeral notice was for the death and burial of Clarence Earl Gideon. I knew nothing but that, and I knew no one to telephone but the funeral parlor. So from London I telephoned the funeral parlor in Hannibal and spoke to the owner, who told me the name, the address, the phone number of Gideon's mother, who was still alive. I was about to hang up when he said—and forgive the reminiscing, but it is in my mind—when he said, "Did you know that Hannibal, Missouri, was the

birthplace of Mark Twain?" I said, "Yes, I do."

Then I hung up and called Gideon's mother. I introduced myself. I just gave my name and she said, "You're the fellow who wrote that terrible book!"

I said, "What do you mean?"

She said, "Well, you said those terrible things about my second husband, and said he was cruel to Clarence, and that wasn't true. Those were lies."

I said, "Well, Mrs."—I don't remember her name—but "Mrs. Jones, actually I didn't say those things; Clarence said those things. I just quoted his letter. I printed it in full."

She said, "Well, it wasn't right. You shouldn't have printed it!" And, you know, it shows you that there is another view.

But anyway, at the end of the conversation she said, "If he'd gone to school as he ought to and behaved himself, Clarence could have been most anything." And I said, "But he was something." And he was.

DEAN MILSTEIN: Thank you for the reminder again that the law is about people and about clients.

We now move to our panel discussion. I would like to introduce Professor Richard Wilson, the Director of our International Human Rights Clinic, who will be the moderator of the panel. Professor Wilson has been a public defender in Illinois. He was the Director of the Defender Division of the National Legal Aid and Defender Association, a Professor at the CUNY Law School in New York, and since 1989 a member of our clinical faculty. Professor Wilson will moderate the panel and introduce the other panelists.

Recollections, Viewpoints, and Discussion About Right to Counsel Before and Thirty Years After Gideon v. Wainwright

PROFESSOR WILSON: Justice Brennan, other honored guests: It is an incredible privilege for me to be here this afternoon to speak to all of you about my own experience as a public defender and to introduce several people who played a role in the *Gideon* decision, and the director of a public defender office who will speak of her own experiences as a public defender. I made the decision to begin work as a public defender in my third year of law school. I was a clerk in a public defender office in southern Illinois and had the great good fortune and luck of briefing and arguing five criminal appeals, in all of which I was successful in obtaining a reversal of the defendant's conviction, or a significant reduction in that defendant's sentence. It confirmed my decision that public defense was my chosen career.

I believed that my choice to become a public defender lived up to the highest moral aspirations of the legal profession.

However, I found quickly as a new public defender that the first question I was asked was often, "How can you represent somebody you know is guilty?" At first I thought the question was strange and somehow had some underlying prejudice. I had never heard, for example, of a doctor who had mended the wounds of a poor patient with gunshot wounds from a bar fight and was asked, "How can you treat someone you know is guilty?" I had never heard anyone ask a psychologist who provided therapy to a poor person whose psychoses may have led to violent behavior, "How can you counsel someone you know is guilty?"

Later, through my 13-year career as a public defender, at every cocktail party at which I was asked that question I adapted my answers to fit my mood. I said, "I enjoy working with underdogs"; "I am fascinated by the causes of aberrant human behavior"; "I distrust all authority, especially that of the government"; "I have a masochistic desire to lose" (and I did, frequently); "Someone has to do it"; and, "My clients themselves are the victims of social injustice."

However, in thinking about my remarks today, I believe that at bottom, myself and others who have dedicated their lives to careers as public defenders do so because it is a way for me and for my profession to recognize and honor the dignity and worth of every person who is hauled before a court of law. That notion, unfortunately, is not universal. In my work more recently with international human rights, I have become aware that the commitment we have in this country to public defense services is truly exceptional. Very few governments in the world provide state subsidized defense services for the indigent accused at all, let alone the nearly $1.7 billion it is estimated that we spend now at the federal, state, and local levels on the provision of defense services throughout this country.

Justice Black's opinion for the Court in *Gideon* provides an international perspective. He said, "The right of one charged with crime to counsel may not be deemed fundamental and essential to a fair trial in some countries, but it is in ours."[4] In some countries, representation of the unpopular and poor defendants can get you killed. Two examples from an all-too-long list will suffice. In 1989, Patrick Finucane, a Belfast solicitor active in criminal defense for ten years, was shot dead in front of his family by three men claiming affiliation with the Ulster Freedom Fighters, a local paramilitary

4. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

group. In that same year, Tao So Lung, a young lawyer and officer with the Singapore Law Society, was placed in solitary confinement in Singapore under the Internal Security Act for her defense of criminals accused in political trials. She remains in solitary confinement today.

While lawyers here seldom risk their lives, it is remarkable, I think, that only within most of our lifetimes the right to counsel has achieved full constitutional vindication. Several of the lawyers who were involved in the litigation leading to definitive constitutional protection of the right to counsel in criminal cases are here today. The first to speak to us will be Abe Krash. Mr. Krash, educated at the University of Chicago, has been with the law firm of Arnold & Porter since 1953. As a young partner in that firm, he joined Abe Fortas on the brief before the U.S. Supreme Court. He is now a senior partner at Arnold & Porter. Abe Krash.

Remarks of Abe Krash, Esq.

ABE KRASH: Thank you. Justice Brennan, Mary, honored guests: The two architects of the *Gideon* decision were Abe Fortas, a brilliant advocate, and Hugo Black, a great judge. Each of them was a remarkable man. It seems to me appropriate on this occasion, when we celebrate the thirtieth anniversary of the *Gideon* decision, to take a few moments to remember them and to speak of the contributions that each of them made to this landmark decision.

Measured by any standard, the man appointed by the Supreme Court to represent Clarence Earl Gideon, Abe Fortas, was one of the best lawyers of his generation. He was a superlative legal craftsman. He was an artist in the law. Fortas had been a lawyer in the government during the New Deal and World War II. He had worked together with Jerome Frank in the Agricultural Administration; at the Securities and Exchange Commission with William O. Douglas; and at the Department of Interior with Harold Ickes. At the age of 32, he was appointed Under Secretary of Interior. Fortas became justly renowned during the Roosevelt years as one of the outstanding lawyers in the government.

After World War II, he formed a private law firm together with Thurman Arnold and Paul Porter. In private practice, Fortas advised clients with antitrust and securities problems and in matters involving federal administrative agencies and Congress. He was not a specialist in the criminal law. Yet, as a lawyer and as a judge he was to play a major role in three of the most important decisions in the criminal law during the past half-century.

In 1953, he was appointed by the United States Court of Appeals

for the District of Columbia Circuit to represent the appellant in a case called *Durham v. United States.* He urged the Court of Appeals in that case to abandon a test of criminal responsibility that had been adopted in England over a century ago, to take account of developments in psychiatry, to allow psychiatrists to participate in a meaningful way in a criminal trial, and to reform the insanity defense in criminal cases. In the *Durham* case, the Court of Appeals established a new standard of criminal responsibility, and it ignited the debate concerning that issue which has continued to this day.

In 1967, when Abe Fortas was a Justice on the Supreme Court, he wrote the opinion of the Court in the *Gault* case, a significant decision involving the rights of juveniles. And, as Clarence Earl Gideon's advocate in the Supreme Court he played a key role in that case. The *Durham* case, *Gault,* and the *Gideon* case all bear the unmistakable imprint of Abe Fortas.

Shortly after he was appointed by the Supreme Court to represent Gideon, Fortas asked me to assist him. It was a command performance. I was aided by an associate in our firm, Ralph Temple, and by John Ely who was a third-year student at the Yale Law School and was spending his summer at our firm. Ralph Temple went on to become a prominent civil liberties lawyer, and John is now, I think it fair to say, one of the country's most distinguished constitutional law scholars.

The task, which Fortas set for himself as an advocate in the *Gideon* case, was to convince the Supreme Court to rule that every person in this country accused of a serious crime is entitled to a lawyer, whether the prosecution is in a federal or a state court. Moreover, Fortas wanted to persuade all nine of the Justices to endorse that principle. One of the first questions he put to us when he summoned us together to consider how we were going to write the brief was this: How do we convince the Supreme Court that a ruling requiring the appointment of counsel in all criminal cases would not be a radical step?

The Supreme Court had decided in 1938 that the Sixth Amendment required that a lawyer be furnished to the defendant in every federal criminal prosecution. The Court had also ruled that an accused person was entitled to counsel in every state criminal case involving the death penalty. But the court had refused to extend that requirement to prosecutions in the state courts for noncapital crimes, even serious felonies. The Court had ruled in 1942 in *Betts v. Brady* that the states were required to furnish a lawyer to an indigent defendant only if the case involved special circumstances such as a

youthful or mentally ill defendant. That was the law at the time of the *Gideon* case.

We ascertained that the great majority of the states had already made provision by 1962 for the appointment of counsel in all felony cases, either expressly or as a matter of practice. There were only five states at that time—Alabama, Florida, Mississippi, North Carolina, and South Carolina—that did not provide for the appointment of counsel in behalf of indigent defendants in all felony cases. It followed, therefore, that a decision by the Supreme Court that the Fourteenth Amendment required the appointment of a lawyer by the states in all criminal cases would not be a revolutionary step.

The second issue that Fortas felt he needed to address was a more troublesome question. It was the issue of federalism. The precise issue presented by the *Gideon* case was whether the states were obliged by the Due Process Clause of the Fourteenth Amendment to provide counsel to an accused person in all felony cases. At that time—I am speaking of the 1960s—there was a great ongoing debate within the Supreme Court concerning the application of the Bill of Rights to the states under the Fourteenth Amendment. The first Ten Amendments to the Constitution apply to the Federal Government. The issue was whether, pursuant to the Due Process Clause of the Fourteenth Amendment, all of the Bill of Rights, or only some of them, also limited state power.

The challenge confronting Abe Fortas was to convince those Justices who were reluctant to expand the scope of the Fourteenth Amendment to rule that the Due Process Clause required the states to provide a lawyer to a defendant in every felony case, and not only in a case involving special circumstances. The insight that Fortas had on this problem of federalism can be expressed this way: the special circumstances test was a doctrine that should be rejected even by those Justices who were sensitive to States' rights and who were reluctant to expand the scope of the Fourteenth Amendment.

Fortas pointed out that in nearly every case involving conviction in a state court where the defendant had not been represented by a lawyer, a habeas corpus petition would be presented to a federal judge by the convicted person seeking review of the state court's judgment as a denial of due process. What could be more of an irritant to state court judges, Fortas asked, than to have a federal judge review their decisions under a vague standard on a case-by-case basis?

In the brief he submitted to the Supreme Court, Fortas' argument was essentially simple. An accused person cannot effectively defend

himself without a lawyer. The defendant cannot properly evaluate the legality of his arrest. He cannot determine the validity of the indictment, or whether a search and seizure has been lawful, or whether a confession is admissible. He cannot determine whether he is responsible for the crime, or for a lesser offense. At the trial, the defendant is not equipped or qualified to make objections to evidence. He is unable to act as a lawyer would in the sentencing process. In short, the assistance of a lawyer is essential to a fair trial and, accordingly, it is required by due process of law. It was an elegant brief.

In his memoirs, Justice Douglas wrote that Abe Fortas' oral argument in the Supreme Court in the *Gideon* case was probably the best single argument that Douglas heard in all of his thirty-six years on the Supreme Court. To me, Abe Fortas is a tragic figure, but his extraordinary brief and argument in the *Gideon* case are models of the art of advocacy, and his great contribution to the *Gideon* case should be remembered, and it should be honored, as among the finest hours of the bar in recent times.

It must have been a wonderful moment for Hugo Black when he delivered the opinion of the Supreme Court in the *Gideon* case on the morning of March 18th, 1963. Twenty-one years earlier, Justice Black had dissented, together with Justice Douglas and Justice Murphy, when the Supreme Court had ruled in the *Betts* case by a vote of six to three that the states were not required by the Fourteenth Amendment to provide counsel to indigent defendants in all cases. Justice Black believed passionately in the Bill of Rights. He was a fighter, and he battled tenaciously and with a singleness of purpose for two decades to convince the Court to extend to the states each of the rights and liberties guaranteed by the Bill of Rights. And now, he was the spokesman for a unanimous Court holding that the right to counsel, guaranteed by the Sixth Amendment, is a fundamental right essential to a fair trial and is made obligatory upon the states by the Fourteenth Amendment. I say, what a wonderful moment it must have been for Hugo Black!

There are two separate themes in Black's great opinion in *Gideon.* There is the concept of fair trial and due process of law, and there is the idea of equality of justice for all persons regardless of economic circumstances. First of all, Black's opinion reflects the view that in our adversary system of justice an individual needs a lawyer to prepare and to present his defense. Hugo Black knew from personal experience how important it is to have a lawyer at your side in the courtroom. He had been a county prosecutor, a police court judge,

and a practicing lawyer in Birmingham, Alabama, a tough and violent steel town in the early years of the century. He had defended Afro-Americans who were detained in the city jail longer than their sentences required. And when he was the prosecutor for Jefferson County, he fought against third-degree measures used by the police to extract confessions. As he stated in the *Gideon* opinion, "Reason and reflection require us to recognize that in our adversary system, a[] person . . . cannot be assured a fair trial unless counsel is provided for him."[5]

The second theme in the *Gideon* opinion reflects Justice Black's profound empathy for those who are poor and disadvantaged. Black had vivid memories of the pervasive poverty and of the racism he had experienced when he was growing up in Clay County. As a lawyer, he had represented coal miners in the first strike in the State of Alabama. And as a prosecutor, he attacked unfair settlements made with injured workers by insurance companies. When he ran for the Senate in 1926, Black's campaign slogan was, "I am not now and have never been a railroad, power company, or a corporation lawyer." It was simply unacceptable to Hugo Black that a man should be denied a fair trial because he was poor. For Justice Black, a lawyer in a criminal case was a necessity, not a luxury.

Of all the men and women in public life in Washington in my four decades in this city, I count Hugo Black as one of the most admirable, and I regard the *Gideon* decision as one of his greatest legacies to our generation and to future generations of Americans.

Before concluding, I would just like to say one word about the enduring significance of the *Gideon* case. It is true, regrettably it is true, that the high hopes we had in 1963 have not been fulfilled. Much remains to be done if the right to counsel is to be meaningful. However, I think it is significant that the *Gideon* decision has been immune from attack even by the most severe critics of the Warren Court. Some critics have urged the Supreme Court to limit or to overrule various decisions of the 1950s and the 1960s with respect to the rights of accused persons, but no responsible voice—no responsible voice—is heard today urging that the *Gideon* decision should be overruled. Even the most severe critics of the Warren Court do not say today we should abandon the ruling of the *Gideon* test case. The right to counsel in a criminal prosecution is accepted as a fundamental right. The *Gideon* case stands, I suggest, as a landmark in American constitutional law because it affirms a principle that is basic

5. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

in a free and just society. Thank you.

PROFESSOR WILSON: Thank you, Mr. Krash. Professor John Hart Ely was a second-year law clerk at Arnold & Porter when he undertook the task of preparation of background memoranda and research in support of the work of that firm in *Gideon v. Wainwright.* Since that time, he graduated from law school, clerked with Chief Justice Earl Warren, became a public defender in San Diego in both the state and federal courts, and later served as General Counsel in the Department of Transportation in the Ford administration.

He has been a law teacher at the law schools at Yale, Harvard, and Stanford, and served as the Dean at Stanford Law School from 1982 through 1987. He is a visiting Professor of Law at the University of Virginia this year. He has authored two books, *Democracy and Distrust* in 1980, a winner of the Order of the Coif Award, and a forthcoming book, *War and Responsibility,* which will be released later this year. Professor John Hart Ely.

Remarks of Professor John Hart Ely

PROFESSOR ELY: A lot of nice things have happened here this afternoon, and I think one of them is that the name of Abe Fortas has been uttered without embarrassment and even with praise. I am delighted that the firm that no longer bears his name saw fit to make the gift in his honor. Whatever mistakes he made—and he plainly made some—he did not deserve the ignominious end he had, and he did a lot of great things. (Of course he didn't do them alone. If I am not mistaken, Abe Krash was also on the *Durham* brief with him. [Krash indicates yes.] And I am sure you would have been on the *Gault* case if you were not a little old to be a law clerk at that point.) [Laughter].

It is not necessary to reminisce about what happened here. That would be superfluous given Tony's excellent book and the movie based on it. The book is called *Gideon's Trumpet,* of course. I've been a law teacher most of my career, as you heard, and the book has caused me a lot of trouble because endless law students come into my office and say, "I don't want to go the usual route this summer. I want a job like you had." [Laughter].

I say, "Well, that may not be replicable."

Actually, I went to the firm knowing that it had this case, and even had bargained to get to work on it before I went there. Why a firm full of associates agreed to let a summer clerk work on this case so centrally I don't know, but I'm sure they knew what they were doing. [Laughter]. And besides, those guys are all rich now, so who cares?

So they didn't get to work on *Gideon*, but they could buy and sell me. [Laughter].

Well, anyway, students come in and say, "Let's figure out what's the next *Gideon v. Wainwright.* I am going to angle for this job. We've got to figure this out." [Laughter].

Then I say, "They paid me $75 a week."

Then the student says, "I'll get back to you on this idea." [Laughter].

I also learned something from the movie. I got, as I guess we all did, a script for my approval. This must have been so we wouldn't sue them. I read through it. It has two sickening scenes.

In one I appear and say, "Oh, Mr. Fortas, congratulations! You are a role model, a hero, you're everything I've ever wanted to be. If I could be like you, I would grow up to be a happy man," or something along those lines, which doesn't sound exactly the way I usually talk. And my other scene was, sitting at the Supreme Court argument, I turn to Abe Krash and say, or whisper, "Now just who is it that's on the other side in this case?" This is months after working on it. [Laughter]. So there I am, an obsequious and retarded law student.

But in the script there was also this wonderful scene which replicated a memo I actually did send to Abe Krash and Abe Fortas saying that if Gideon had had a lawyer, here are the various things he could have done. And it had the actor playing me acting out the possible trial, and it was a lengthy and wonderful scene. And I said, okay, I will agree to the package because that scene is in there. I don't like this other stuff, but I'll go for the package.

Well, you can probably figure out what happened. [Laughter]. Two of those three scenes are in the movie. [Laughter]. I can't even tell you who played my part. The credits at the end of the movie listed a number of people. It said, "The part of Ralph Temple was played by X; the part of James Fitzpatrick—these were associates in the firm—was played by Y," but nothing about John Ely.

So I went up to Tony's friend, Mr. Rentelle, at the showing at Harvard and I said, "How come it didn't say the part of John Ely was played by" so and so. I didn't see my name there.

He said, "Oh, the guy who played you was up at the beginning without a special billing because you were one of the main characters."

I said, "I had two lines."

He said, "Well, before the cuts were made, you had one of the main parts." [Laughter].

It has become mildly fashionable—we heard the beginnings of it

today—to say that this is a case that hasn't panned out. I want to dissent from that, somewhat. I have got here a column from *The Washington Post* for January 23rd of this year written by Nat Hentoff, called "A Disgrace to the Law." It is about the anniversary of *Gideon v. Wainwright,* and the gravamen is—I use that word for you law students—the gravamen of the column is that *Gideon* hasn't worked. Hentoff's central exhibit is that the percentage of defendants represented by public defenders has gone up markedly over the last ten years. I would like to suggest that that is not an element of proof that anything is going wrong.

You will hear from Ms. Davis, and I will be interested to hear what she has to say, if she wants to address this, but remember to the extent she is describing her office as bleak, she does have a budget that she has to defend and augment. I, however, wish to defend the proposition that by and large public defender's offices (emphatically including hers) are pretty darn good.

As was said, after law school and after I clerked and so forth, I did go to work as a public defender in San Diego. There were maybe two, three, four, five people—and this is a city of about a million people—lawyers in town that were better than we were, a handful. Then there were us. Then was everyone else in terms of ability to represent people. The "everyone else" subdivided into two categories: people who really needed the work and couldn't get it anyway else, who just hung around waiting to be appointed; and corporate lawyers who were smart but didn't know what they were doing in a criminal courtroom.

Now occasionally, it was true, someone that I was appointed to represent would ask for a "real lawyer," and didn't want a public defender. Those scenes are etched in my mind.

The Judge would get a glint in his eye and say:

"Now let me see if I have this straight. I want this on the record. You wish to dismiss Mr. Ely as your counsel? Is that right? I want to be clear that you know what you're doing here"—and of course the judge would proceed to appoint some incompetent in place of me.

I of course am disabled from leaping up and saying, "Idiot, can't you see what's happening? He's about to give you somebody who doesn't know what he's doing!"

There's another interesting thing that I noticed. That was, that the clients *in jail* never dismissed the public defenders—because they were able to talk to other prisoners and get an idea of who was good and who wasn't. Now, as I say, there were a few people in town who were better than we were, but by and large the best defense came from the

public defenders.

I had one guy not in jail I will take just a moment to tell you about. This guy was not so sure. He was thinking about dismissing me. He came to every case I tried, and he would sit in the front row to watch me. His case was coming up in a couple of months. He would sit there, and sit there, and usually at a break he would come up and offer to testify as an alibi witness in behalf of the defendant. [Laughter].

Don't worry, I didn't use him more than three or four times. [Laughter].

Despite his high opinion of me, he ended up pleading guilty—but I thought it was fun.

Now I think it is generally admitted that public defenders are expert and capable lawyers. Several things, however, are true. Number one, they are overburdened. I think that is universally true. Again quoting from Hentoff, "I have for instance seen enormously overburdened public defenders meeting their clients for the first time only fifteen minutes before a hearing."

That may be true, but you want to know what the hearing is. If the hearing is the arraignment where a plea has to be entered, fifteen minutes is plenty. Unless they are essentially offering you a dismissal, the plea is "not guilty." You don't need more than fifteen *seconds* to figure out that that ought to be the plea at that point.

Of course overburden is a problem, but it is one route to expertise. I don't think anyone who has decided to devote their life to this kind of work is going to let it overwhelm them to the point where they are not adequately representing their clients. People who do this kind of work are by nature cantankerous, disagreeable people, and they will speak up and not let it happen. [Laughter].

Second, it is sometimes alleged, and I think I have seen this played out, that there are conflicts of interest because you are representing so many people. It used to be an old myth that public defenders would trade so many guilty pleas for so many reductions of pleas. I never saw that happen. It would be flagrantly unethical. Any defense lawyer who did that ought to serve the time for which he had just pleaded his client.

It seems to me a public defender should behave, and this is certainly how I behaved, and I never knew one who didn't, as if he or she were a private lawyer and make in each case the arguments he or she would make if it were a private client. You don't tailor your arguments in one case because you are thinking about another client, any more than a private lawyer should; and the judge has no more

business pointing out in the presence of the jury that you made the opposite argument last week than he would have in a case where you were a private lawyer.

Now there are those three or four guys that are better. That is true. Either they are more talented—it could happen, I guess—[Laughter]—or they have more time and money.

Okay, we never thought *Gideon* meant that everybody was going to get the best lawyer in town who would have an entire month to spend on his case. If you think it through logically, it can't mean that. It is a physical impossibility. *Gideon* can't mean that everybody gets the defense that the richest guy in town gets. Because, as you can see, that is a spiral that would have no end.

Of course there are incompetent lawyers. That is one reason I would label atrocious the current Supreme Court's cutback of habeas corpus and postconviction remedies, particularly in capital cases, but in other cases as well. I do not think it is costing us much in terms of either money or threats to federalism that where there is a serious sentence, we look at criminal convictions again, even repeatedly.

But I don't think incompetent lawyers are any more common than incompetent plumbers, incompetent car mechanics, or incompetent doctors. Many people are incompetent at their jobs. I do not think that lawyers are any more so than others. And I certainly do not think—in fact, I think the opposite—that it is the case that public defenders are less competent in criminal defense than other lawyers. In fact, I think they are substantially more competent. Thus, I think Hentoff is wrong. The increasing percentage of indigent defendants being represented by public defenders seems to me a cause for rejoicing, not a proof that *Gideon* has failed.

There are some decisions of the Warren Court that one can argue have not made a hell of a lot of difference. Apparently the school prayer decisions are widely ignored. Even *Brown v. Board of Education* is a hard case in that respect. It has meant some desegregation: that it has meant increased quality of education for African-Americans or, for that matter, for anybody else, is a highly debatable proposition. *Miranda*? I don't think it's done any harm. On the other hand, I'm not sure it has done much good. The incidence of confession doesn't seem to have gone down particularly; the incidence of lawyers actually appearing in station houses is about what it was before *Miranda*—that is, zero.

But *Gideon*? I'm sorry, but I have a lot of trouble seeing this as one that has failed. It seems to me that it is one that has succeeded, and in particular I wanted to enter my dissent from the inference from

the fact that public defenders may be handling more and more cases to the conclusion that the quality of representation is going down. I rather suspect it is proof that it is going up.

Thank you.

PROFESSOR WILSON: Thank you, Professor Ely. Dean Bruce Jacob, at the time he began representation of the State of Florida in *Gideon v. Wainwright*, was an Assistant Attorney General, age 26. Before he completed his work in the case, he entered private practice with what is now the law firm of Holland & Knight, and began his teaching career in 1965 at Emory Law School where he was a clinical teacher and founder of the Legal Assistance for Inmates Clinic at that school. He subsequently taught at Ohio State University where he was Director of Clinical Programs and also did graduate work at Northwestern and Harvard Law Schools. Since then, he has served as Dean of the law schools at Mercer in Macon, Georgia, and Stetson Law School in St. Petersburg, Florida. Dean Bruce Jacob.

Remarks of Dean Bruce R. Jacob

DEAN JACOB: I would like to thank Dean Milstein and The American University for inviting me to be here today. It is a great privilege to be able to participate in this panel discussion commemorating the thirtieth anniversary of the decision in *Gideon v. Wainwright.* During these past thirty years, I have been asked many times what it was like to argue before the Supreme Court as a young Assistant Attorney General of Florida in the *Gideon* case. When I spoke with Dean Milstein and with Rick Wilson several weeks ago about this program, they said that that is what they would like me to talk about. They wanted me to answer that question. So what I will do today is to try to give you my impressions and my recollections of what it was like to be involved in this great case.

The *Gideon* case began for me in the summer of 1957. I had just finished one semester of law school and had gotten a job in the Panama City area in the Panhandle of Florida riding a soft-drink truck. We went to every gas station and every grocery store, every bar, and it was my job to go into the store and to try to persuade the owner to take on a couple of new lines of soft drinks. One of the places we went to that summer was the Bay Harbor Pool Room. It was in a rundown section of Panama City, in a working class neighborhood with a number of boarding houses and bars, as I recall.

Several years later, in June 1961, at about 5:30 one morning, a breaking and entering took place in the Bay Harbor Pool Room. Coin boxes in the cigarette machine and juke box were broken into.

Coins and some bottles of wine were taken. Clarence Earl Gideon, who was living in the area at the time, was arrested and charged with the crime. The case came before the circuit court for trial. Here is an excerpt from the transcript as the case was called for trial:

> JUDGE: Are both parties ready for trial?
> PROSECUTOR: Yes
> GIDEON: I am not ready, your honor.
> JUDGE: Why not?
> GIDEON: I have no counsel.
> JUDGE: Why did you not secure counsel?
> GIDEON: I request this court to appoint counsel.
> JUDGE: I am sorry I cannot appoint counsel. Under the law of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged in a capital offense.
> GIDEON: The U.S. Supreme Court says I am entitled to be represented by counsel.
> JUDGE: Let the record show that the defendant has asked for counsel.

The court denied the request and informed him that only in a capital case was he entitled to counsel.

Some of the judges in Florida at that time were appointing counsel whenever the defendant in a noncapital felony case decided to plead not guilty and go to trial. However, this was not required under the law at that time and the judge in this particular case decided not to appoint counsel. The *Betts v. Brady* rule, which was in existence at that time, provided that counsel should be appointed whenever special circumstances were present. For example, if a defendant was extremely young, inexperienced, illiterate, or if he had a mental illness, counsel should have been appointed for him under the *Betts v. Brady* rule. However, an older person such as Gideon, who was about 52 years old at the time, who had had previous experience with the courts and who was intelligent and did not seem to have any mental problems or any other such problems, was, under *Betts v. Brady*, expected to represent himself.

Why did Gideon keep insisting that he was entitled to counsel even though there were no special circumstances present in his case? One reason could be that he had previously been tried for a noncapital felony in the federal courts. In the federal courts, counsel was being provided in every single case under the rule of *Johnson v. Zerbst*, a case decided in 1938. It is possible that Gideon thought that that was the rule in every state as well as in the federal system, and perhaps that is why he insisted that he should have counsel.

Gideon went to trial. He cross-examined the witnesses for the prosecution. He decided not to take the witness stand in his own behalf. He was convicted and given a five-year sentence for the crime of breaking and entering with intent to commit a misdemeanor. The five-year sentence was due to the fact that he had prior convictions. He took no appeal from his conviction. However, he filed a handwritten habeas petition directly in the Florida Supreme Court.

At that time in Florida, a habeas petition could be filed in any circuit court, in any district court of appeal, or in the state supreme court, or before any judge or justice of any of these courts, challenging the legality of an individual's detention. In his petition, Gideon merely asserted that he should have had counsel appointed. He did not allege that any special circumstances were present in his case. The Florida Supreme Court denied the habeas petition, merely saying that there was no absolute right to have counsel appointed under Supreme Court decisions up to that point.

He then filed the handwritten *certiorari* petition to the United States Supreme Court. The Court granted the petition and asked counsel on both sides to argue the question of whether or not *Betts v. Brady* should be reconsidered.

At that time I was a recent law graduate working in the Florida Attorney General's Office in Tallahassee. Some of us knew that this was probably the vehicle which the Supreme Court would use to overrule *Betts v. Brady* and to impose a flat, absolute requirement that counsel be appointed in every single noncapital felony. We hoped, however, that the new rule would not be retroactive. We also hoped that the rule would not be extended to misdemeanors and appeals because we thought it would be very difficult for the state to implement such a rule immediately.

I was working in the Criminal Appeals Division of the Attorney General's Office, and there were four of us in that office handling appeals and habeas petitions throughout the state. I was the only one of the four at the time who had not yet argued a case in the Supreme Court of the United States, and I think that is the reason why I was chosen to handle the *Gideon* case. Another possible reason is that the head of our office, Reeves Bowen, and I had worked together on some law review articles the previous summer, and he knew that I enjoyed legal research and that I loved legal history. He knew that I would put a lot of time in on the case, and that also may have been part of the reason why he allowed me to handle *Gideon*.

I began working on the *Gideon* case in 1962. Shortly afterwards, I changed jobs and moved to Bartow, Florida, to work in the firm of

Holland, Bevis & Smith, now known as Holland & Knight. I asked the Attorney General of Florida, Richard Ervin, if it would be all right for me to continue handling the *Gideon* case, and he said it would be fine with him. I also asked Chesterfield Smith, who is sitting in the audience today and who was the head of the Holland firm, if it would be all right if I continued handling the case, and he also agreed. I told him I would do the work after hours and that my wife, Ann, would do the typing.

At about that time, Abe Fortas was appointed to the case to represent Gideon. He had been a member of the *Yale Law Journal.* He was a brilliant Washington lawyer. He had been the personal attorney to Lyndon Johnson and was a member of the firm of Arnold, Fortas & Porter.

We moved to Bartow in September of 1962 and, throughout that fall, I worked on the brief in the *Gideon* case. By the way, the case at that point was called *Gideon v. Cochran,* because Cochran was the Director of the State Department of Corrections. On weekends, Ann and I would drive to either the Stetson College of Law to do research, or we would drive to Tallahassee to do research in the State Supreme Court Library. That library had a lot of historical and old English materials, and that is why we went to Tallahassee quite often on weekends to work on the case. The Supreme Court librarian entrusted me with a key to the library, and I worked down in the basement where all of the historical materials were kept. There were no Xerox machines back in those days, and I would point out excerpts that I needed to save for research purposes, and Ann would then copy those sections onto note cards in longhand. We would work nights at Holland, Bevis & Smith, or at the Polk County Law Library, which I also had a key to, and, again, my wife would write down the sections which I would ask her to copy.

The argument in our brief began with the history underlying the Sixth and Fourteenth Amendments to the Constitution. Historically there was a right to retained counsel in some instances but not a right to have counsel appointed. We made the argument that a case-by-case determination of the need for counsel was more consistent with due process than a flat rule requiring counsel in every case. We pointed out that an automatic appointment in every case had not yet risen to the level of a fundamental right throughout the country. Also, if an automatic rule was to be adopted, logically, counsel would have to be provided in misdemeanors, appeals, and civil cases. Furthermore, the question of adequate representation would become a problem if *Betts* were to be overruled. Defendants would receive

counsel but could then argue that they did not receive adequate representation. Another important issue to us was whether a decision overruling *Betts* would be retroactive. We were concerned about turning large numbers of inmates loose at one time.

We realized that *Gideon* would probably be the case which would be used by the Supreme Court to overrule *Betts v. Brady*, and we felt that the other attorneys general throughout the country should be aware of this. We knew that if the Court overruled *Betts*, it might also require the appointment of counsel in misdemeanor cases and appeals, and that this would be of great interest to the other states. Therefore, we wrote letters to the attorneys general of all the states in the country asking them to join with us in an amicus brief.

Later on, when Anthony Lewis interviewed me, he asked whether this was a tactical mistake on our part, because, as you know, we had only Alabama and a couple of other states joining us in an amicus brief, and on the other hand something like twenty-three states filed an amicus brief against us. I told him, and I still believe, that it was not a mistake. We weren't concerned about tactics in this case. The issues in the case were of such enormous importance that tactics and strategies seemed out of place. We just wanted the other states to know what was happening. We wanted them to be aware that the rule could be imposed requiring counsel in all felonies, and misdemeanors, and appeals, and we wanted them to have an opportunity to say what they wanted to about these issues if they so desired.

A couple of years earlier, a member of our office had argued a case before the Supreme Court and had been criticized by the attorney general of another state for not notifying him that the issue in that case was before the Court. Because of this, we decided all the attorneys general of all of the states should be notified that these issues were about to be argued before the Supreme Court.

In the summer of 1962 we asked for a survey in the state prison system in Florida to find out how many prisoners would be affected by the overruling of *Betts*. We found that about 4500 of the 8000 prisoners then in the Florida prison system had been convicted without the benefit of counsel. Most of them, about 4000 of the 4500, had been convicted after pleading guilty, but the others had been convicted after going to trial. So we then knew that if the new decision were to be in Gideon's favor and were to be made retroactive, as many as 4500 of the 8000 inmates in Florida could be released and retried or released without retrial.

The arguments were set for January 1963. We were given an hour and a half for the argument. I asked George Mentz of Alabama, the

Assistant Attorney General who had written the amicus brief in our behalf, to take a half hour, and I kept one hour for my argument.

To prepare for the case, I knew that we needed to take some case opinions with us to Washington, D.C. As I said, in those days we had no Xerox machines. The only way I could take case opinions was to take the entire book. So I took about thirty-five books along with me in a suitcase. We flew by propeller plane. In those days there were some jets, but we flew in a propeller plane. We arrived in Washington, D.C. early on a Sunday before the arguments began. I met George Mentz and we talked about the case at our hotel.

The next morning Ann, George Mentz, and I went together to the Supreme Court. My impressions of the Supreme Court on that first visit are still rather vivid in my mind. Before the Justices entered the room, I noticed that each Justice had a different sized chair. Justice White, for example, had an enormous chair, while Justice Black, as I recall, had a little tiny chair which seemed about half the size of Justice White's chair. The Justices came in, and the first thing they did was swear in new members. George Mentz moved my admission, and Chief Justice Earl Warren welcomed me as a member of the Bar of the Supreme Court. At that time, I was twenty-seven years old and had just barely three years of practice, which was the minimum required for admission to the Bar of the Supreme Court.

The rest of that day we listened to the reading of opinions. During the reading of the opinions, the Justices would send notes to pages, and the pages would come in and out of the Court delivering messages, or carrying books to the Justices. Sometimes the Justices would get up and leave. At one point, Justice White whirled around and faced the other way, away from the audience. Justice Douglas began writing feverishly for some time and when he finished he began licking envelopes and pounding the envelopes shut. Later on I learned that he wrote letters to his friends during some Court sessions.

Justice Potter Stewart looked out at the audience and began combing his hair with his hands. He looked straight ahead as if he were looking into a mirror. The atmosphere was very informal and relaxed, and it was very obvious that the members of the Supreme Court were not at all concerned about ceremony or formality. This was quite a contrast to the very formal atmosphere in the state courts in Florida that I had been in in the past.

Of course all of this changed the next day when the arguments began. The atmosphere then became very intense. The informality disappeared, and it was all business from that point on. The reading

of the opinions took all day Monday, and our case was scheduled to be heard the next day. There was one case before ours: the *White Motor Company* case. In the Supreme Court, there is a backup table, and I was sitting at the backup table behind the attorneys in the *White Motor Company* case. One of the attorneys was Archibald Cox, who was the Solicitor General of the United States at the time. He was dressed in a coat and tails. Also, Gerhard Gesell, who was an attorney at the time—this was before he was appointed to the bench—was wearing a coat and tails. I was wearing a blue suit. I had been concerned about what to wear and had called the Court earlier and they said a dark suit was fine. So I did not wear a coat and tails.

I thought that Archibald Cox's argument was the best that I had ever heard. He looked like a basketball player, tall with a crewcut. The words just flowed effortlessly from him. I don't think I had ever heard anyone speak so easily and so effortlessly and so beautifully before.

Gerhard Gesell was seated at the table in front of me. He turned to me several times during the argument and talked with me. He had a wonderful sense of humor. At one time, he whispered to me, "Watch me. I'm going to have to make a jury argument." This is what lawyers sometimes say when they know they don't have much law on their side and they know they'll have to make a stirring emotional argument in order to win their case. Later, of course, Archibald Cox was the Special Prosecutor in the Watergate case, and Gerhard Gesell became a federal judge who tried Oliver North and was involved in other famous cases.

Finally, our case was called. It was shortly before lunch. At that time, as I said, the case was known as *Gideon v. Cochran.* I had not met Abe Fortas before this time, and he had not been at the backup table. So I first saw him when he stood up to argue the *Gideon* case. I believe at that time he was in his early fifties. He was very well dressed in a brown suit, very dapper looking, and as he proceeded into his argument, we took a break for lunch and Abe Fortas and I were led downstairs into a lunch room. Earlier we had been asked what we wanted for lunch. George Mentz had decided not to eat lunch at the Court. Abe Fortas and I were the only two people in that room, and a waiter brought us our food.

As we sat at the table together—the only people in this lunch room—Abe Fortas talked to me. He was very friendly, very kind, very warm. I remember that he talked about Justice Black and how much he thought of Justice Black. He mentioned the case arising in Texas when he had represented Lyndon Johnson regarding election results

there. He had gone to Justice Black and gotten a stay or an order from Justice Black, and he described to me what had happened in that case.

We then returned back to the courtroom, and during the afternoon session there was only one spectator in the entire courtroom—my wife. I remember thinking how strange it was to have a completely empty courtroom for a case which probably would eventually become a landmark decision.

It became my turn to argue. I stepped before the podium and my first impression was that I was in a pit. The Justices were very close to the podium, and they were seated above me, and they were spread out very far to my left and my right. This was different from the arrangements in the state courts in which I had argued previously. In those courts, the podium was set back farther. The judges were seated closer together, and the speaker did not get the impression of being in a pit. The podium had lights on it. There was a green light, a yellow light, and a red light for when the speaker was supposed to stop speaking.

I began to make my prepared argument, but the minute I began there were questions from members of the Court. I was used to the Florida Supreme Court and the Florida appellate courts, where very few questions were asked. These Justices questioned everything. There was no reverence for established rules, and they were willing to reexamine every rule and every concept down to its very foundation. I had not been used to this kind of questioning before.

At times a Justice would ask a question which he knew the answer to but he would use me as a kind of a foil, trying to make a point with another Justice. He would ask me the question, then look down the row at another Justice—as if to say this is a point I want you to understand.

In answer to a question about *Johnson v. Zerbst*, I said that that decision was at least in part based upon the supervisory powers of the United States Supreme Court over the lower federal courts. When I said this, I got the strong impression that this made Justice Black angry. He became red in the face. At this point, Justice Harlan, who was probably the Justice whose views were most favorable to our position, helped me out by saying to me, "Careful now, don't go too far."

The questioning was absolutely brutal, as far as I was concerned. There were about forty questions asked, and I believe that every Justice, except Justice Douglas, asked at least one question of me during that argument. I felt like I was caught in a crossfire. It was

difficult to know which question to take next, and difficult to respond with so many questions coming from so many different directions.

When I sat down, George Mentz stood up and argued. Near the end of his argument, one of the Justices said, "You don't really expect to win this case, do you?" George Mentz answered, "Your Honors, hope springs eternal." This of course drew a laugh from the members of the Court.

After the argument had been concluded, I felt bad, thinking that I had not done a good job, because the questioning had been so relentless. Abe Fortas came up to me in the hall and shook my hand. He could tell that I felt down and, to make me feel better, he said, "You know, you have a wonderful way before the Court." Of course this made me feel very good.

For the flight back to Florida, we went to the Dulles Airport. In those days, apparently not many people traveled by air, because the airport was empty. My wife and I were the only two travelers in the entire airport. I had a suitcase full of books, and in those days luggage had to be weighed. I think it was about fifty pounds overweight, and I had to pay a $50 fine because I had too much weight.

After the case had been argued, Cochran stepped down as Director of the State Department of Corrections, and Louis Wainwright became the Director. I wrote the Court and informed them of this change. I never received an answer from the Court, but when the opinion was released, the name had been changed to *Gideon v. Wainwright.* The opinion, of course, was retroactive, and about 4300 inmates were released under the *Gideon* decision. Surprisingly to us in Florida, there were studies done which showed that not many of these inmates committed further crimes. Of course this was very good news to all of us.

There was a newspaper strike at the time, and Anthony Lewis apparently didn't have a job. Temporarily, his newspaper was shut down and that is why he wrote the book, *Gideon's Trumpet.*

Several years later, Abe Fortas was appointed to the Supreme Court, and at that time I was teaching at Emory University School of Law. Our Dean invited him to come to be our Law Day speaker, telling him in the letter that I was on the faculty. Justice Fortas accepted, and I will never forget when he came to our school. He entered the main lobby. The Dean was there, and the members of the faculty, and there seemed to be hundreds of students crowded around us. Justice Fortas and I shook hands, and at that point he turned to the Dean and he said, "Dean, you have a good man here in Bruce Jacob."

Justice Fortas has always been one of my heroes, as you can probably guess. He certainly was good to me, and I have always had the very highest regard for him.

After the *Gideon* opinion had been released, the case went back to Bay County for retrial. An attorney was appointed to represent Gideon, and he was acquitted at that second trial. There was a transcript made of the first trial. There had been three key witnesses in that first trial. One was a woman sitting on her porch who said that she saw Gideon walking toward her from the Bay Harbor Pool Room carrying some wine bottles. She saw him get into a telephone booth, and then a taxi arrived. A second witness was the cab driver who said that Gideon had a lot of small change with him, and that he paid the entire fare in small change.

The key witness, however, was Henry Cook. He was the only one who could actually place Gideon in the Bay Harbor Pool Room. He said that he had walked by the Pool Room at 5:30 in the morning, had looked in through the window, and had seen Gideon, whom he had known previously, inside. Then he said he saw Gideon come out the side door, walk to the sidewalk, and walk down the street to the telephone booth carrying some wine bottles. Henry Cook clearly was critical to the state's case. It is my understanding that the attorney for Gideon at the second trial was able to discredit Cook by pointing out that Cook initially had been a suspect in the case himself.

This was an interesting experience for a young lawyer. I would not recommend to others doing this at such an early age, but I certainly learned a great deal. If I could have chosen the side I preferred in the case, I would have taken the other side. Even so, I did see some merit in the state's position. As I worked on the case, I was convinced that the state should provide counsel in all felonies, but I also felt that the state should be allowed to experiment with different ways of accomplishing this, and that the state should be allowed to do this on its own, without being forced to do so by the Federal Government.

Now that I am older and have had more experience, I realize that the state never would have done this on its own. The state would not have provided counsel in all serious crimes without being compelled to do so by the Supreme Court of the United States. The *Gideon* case was absolutely necessary in order to accomplish this.

Again, it is a great privilege being here and participating in this panel discussion. Thank you very much for inviting me.

PROFESSOR WILSON: Thank you, Dean. Angela Jordan Davis was not involved in the litigation of *Gideon v. Wainwright,* but she is, like me, a child of the *Gideon v. Wainwright* decision. She is a true public

defender. She graduated from Harvard Law School in 1981 and, after a clerkship with Chief Judge Neumann of the D.C. Court of Appeals, became a public defender with the Public Defender Service in Washington, D.C., one of the finest offices in the country unquestionably. After five-and-a-half years as a trial attorney with that office, she became Deputy Director where she served for three years, and has now served as Director of that office for the past two years. Angela Jordan Davis.

Remarks of Angela Jordan Davis, Esq.

ANGELA JORDAN DAVIS: Imagine practicing law in the basement of an old, dilapidated building with peeling paint, asbestos, broken toilets. Imagine sharing a small office cluttered with broken furniture with one, maybe two other lawyers. Envision having to consult with your officemates before you meet with your client just to get some privacy. Imagine sharing a secretary with seven or eight other lawyers. And imagine working in these conditions sixty to seventy hours per week making one-half, perhaps one-third of what other lawyers with your same experience are making.

The scenario I just described to you is not necessarily a description of the typical public defender service in this country. In fact, it is a precise description of the office that has the reputation of being the top public defender service in the country, and that is my office, the public defender service for the District of Columbia.

When I was asked to come here and reflect upon my own experiences as a public defender, I was concerned that my own experiences would not be typical of the experiences of most public defenders in this country. I was concerned that if I talked about my own experience, solely about my own experience as a public defender, that it would give the erroneous impression that all goes well with indigent defense in this country. Because, despite the description of my office that I just gave—and it is a very accurate description—the Public Defender Service for the District of Columbia provides excellent representation for its clients, representation that I think Clarence Earl Gideon, or Michael Milken, for that matter, would be proud and lucky to have. Because, despite the deplorable physical plant and expected low public defender salaries, PDS provides excellent representation for its clients. It provides extensive training and supervision for its lawyers, a staff of trained social workers, a staff of investigators, and funding to hire expert services without the prior approval of judges.

However, on this anniversary, this thirtieth anniversary of perhaps

for me, anyway, the greatest case in the history of the Supreme Court, I will not regale you with a presentation on how wonderful PDS is. Because it is sad but true, Mr. Ely, that quality representation for poor people in this country is the exception, not the rule. Most public defenders and appointed counsel in a criminal case don't have access to intensive specialized training before they handle cases. Most of them have no training at all except law school, and we all know, or as those of you who are still in law school will find out, that that will not prepare you at all—unless you are in Ric's clinic—to represent clients.

Most lawyers representing poor people accused of crimes don't have access to a staff of social workers, or a staff of investigators. And most of them must request funds for expert services from judges that rarely approve adequate funding for these requests. Most defenders of indigent people do not represent their clients free from the pressures imposed by judges, politicians, and others who literally hold the keys to the bank of limited funds available to represent the poor, or who have the power to fire the defender at will. That is the dismal legacy of *Gideon.*

I have to pause here to say that I agree that public defenders are great lawyers. Most public defenders and many assigned counsel are wonderful lawyers who are committed to what they do and want to do a great job for their clients, and many of them do a wonderful job. But no matter how great you are as a lawyer, you can't do a wonderful job for your client if you don't have the resources to do your job, or if you feel pressure from judges or others around you who discourage you from being zealous in your work. So it is certainly not necessarily about ability, but it is certainly about resources.

Time does not really permit me to completely describe the sorry state of indigent defense in this country today. Most of you have probably heard the horror stories of recent law graduates who have no experience representing people in capital cases or, as Mr. Lewis mentioned, drunk lawyers, or sleeping lawyers who haven't prepared at all who are representing people in capital cases. These horror stories happen far too frequently. But unfortunately, inadequate representation in noncapital cases, many of which involve significant periods of incarceration, also occurs routinely in this country. Again, time does not permit me to relate the countless examples which illustrate this fact, and unfortunately the examples are really more the rule, I think, than the exception.

Mr. Lewis mentioned Indianapolis. In Indianapolis, part-time public defenders are paid, and when I say "part-time," that means that they work part-time as a public defender—I don't know how anyone

can do that—but they work part-time as a public defender, and then they have their own practice with clients that pay. But part-time public defenders are paid about $20,000 a year regardless of their caseload, and they practice exclusively before judges who hire them and who have the power to fire them if they don't like what they're saying or doing in the courtroom. They are provided no office space or support staff. Many of them carry a caseload of seventy cases or more, and they rarely visit their incarcerated clients before their court dates.

In Detroit there is a financial incentive for court-appointed lawyers to encourage their clients to plead guilty. That is because they are paid the same thing for certain categories of cases whether the client pleads guilty or whether the client goes to trial. In other words, if they spend a half hour on a misdemeanor plea or 100 hours on a misdemeanor trial, they are paid the same thing. So there is an incentive to plead clients guilty.

In Harlan County, Kentucky, the public defender carries a caseload of 120 felony cases, and the State of Kentucky spends only about $100 per felony and misdemeanor case. In Atlanta, a public defender was found to have an illegal part-time job moonlighting, representing clients in guilty pleas in another county as he neglected his own caseload, for which he was being paid a salary. In New Orleans, a public defender was so overwhelmed with cases that he convinced a judge to rule that his excessive caseload of over seventy pending cases prevented him from providing effective assistance of counsel. And even in a well-respected office like the Legal Aid Society of New York, which has wonderful, committed lawyers, many of them have caseloads of seventy cases or more, making it impossible to spend adequate time on each case. And budget cuts all over the country, not surprisingly, are decimating already financially strapped indigent defense systems in New Jersey, Tennessee, Florida, Louisiana, the District of Columbia, numerous counties in California, Illinois, Maryland, and in virtually every state.

The budget for the Federal Criminal Justice Act, which pays assigned counsel to represent poor people in federal criminal cases, was depleted before the end of 1991 and long before the end of 1992. Hundreds of lawyers who had represented clients were not paid until the budget was supplemented on an emergency basis. Here we are again in 1993 with the same thing happening. Funds to pay these lawyers will be depleted by the end of this month unless these funds are again supplemented on an emergency basis. This is the legacy of *Gideon v. Wainwright*, Mr. Ely.

When Justice Black said that lawyers in criminal courts are necessities, not luxuries, surely he did not intend that the lawyer should be a warm body standing next to the client processing the case through the system. Indeed, Gideon or any indigent person charged with a crime would do better to represent himself than to have a lawyer with seventy other cases who either has no time or no interest in representing him. The inequalities in our criminal justice system should instill a sense of moral outrage in all of us.

We should all be outraged that there are, in essence, different systems of justice for the rich and the poor, for white people and for people of color. Poor people charged with crimes have no political power. They have no voice. If we wish to instill some sense of justice in our criminal justice system, if we believe in the Sixth Amendment and the principles of *Gideon*, we should be that voice. All of us. We must remind our lawmakers, our judges, and all of our citizens that our criminal justice system is a mockery unless all citizens, regardless of their race, regardless of their economic status, are represented by able, competent counsel. We should also be equally outraged that public defenders and assigned counsel are so devalued in our criminal justice system, and are held to a different standard of performance than prosecutors or judges.

Now I want to talk a minute about being devalued. I was thinking about this. Everybody knows that people look down on public defenders, but I was thinking about it. Public defenders sometimes, unfortunately, look down on themselves. It is sort of like oppressed people who are discriminated against and oppressed. They start to believe what the oppressors are saying about them. They start to have low self-esteem. It seems like that happens to us as public defenders. We think we are supposed to be poor. We think we are supposed to have broken down chairs, and dilapidated furniture. We think we are supposed to be like that. We have been so devalued in our society, even though we work as hard as uptown lawyers who make lots of money—$300, $275 an hour, working on some discrete point in some corporate case. We are fighting for life and liberty, the most important things, and yet we devalue ourselves.

Sometimes we don't stand up and make noise about it because we don't have time, because we have so many cases, and we are working for clients and we don't have time to stand up and scream. We are held to a different standard of performance than prosecutors or judges. Are prosecutors asked to do their jobs without pay? Is their pay withheld until they have closed a case, or completed a trial? Are prosecutors or judges paid by the case, $300 for misdemeanors, $750

for a felony? Are they required to provide their own office space and support staff? Are prosecutors hired by judges to work in their courtrooms? Do prosecutors have to worry that if they fight too hard, or litigate too zealously, they might be fired? Has any prosecutor ever been fired for circulating a memo in his office inspiring his staff to fight harder? That happened to a public defender.

Does any judge even have the power to fire a prosecutor if he wanted to? Of course not! It would be unseemly and unjust to most citizens in our society if either prosecutors or judges were treated this way. Then why are we so accepting of this very treatment of those who defend the poor? Surely we don't suggest that judges or prosecutors are more important than defenders in our criminal justice system? Justice Black, in *Gideon v. Wainwright*, said:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[6]

On this thirtieth anniversary of this most important case, we all have much to accomplish. Like a lot of other movements of the 60s, it sometime seems as if we are not making a lot of progress, like we are moving backwards instead of forward. I say this because in the early 1970s—in the early 1970s—the United States Law Enforcement Assistance Administration spent nearly $10 million on indigent defense, nearly $10 million. But in the late 1980s, the Bureau of Justice Assistance excluded defense services from eligibility from federal funds established to improve the functioning of the criminal justice system. Despite legislation which presumably corrected this exclusion, only a small percentage of these funds have gone to defender offices. We are going backwards. This must change.

As legislators saw fit to pass legislation increasing penalties, and the war on drugs increased arrests and prosecutions, more resources were allotted for law enforcement and prosecution, but not for defender services, widening the imbalance between prosecution and defense. The recession and budget cuts ensued, and indigent defense became

6. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

an easy target. Funding for indigent defense must be increased. We can't have a system in which the lack of money discourages, or even prevents a lawyer from pursuing the best interests of his clients. But more money alone will not solve the problem. No one should handle a criminal case without adequate training.

Life and liberty are our greatest values in this society. Surely we can't place their fate in the hands of incompetent or overworked lawyers. In addition to adequate training and funding, we must assure the independence of defenders. A criminal defense attorney must work for his client, not for the judge, or the mayor, or the governor, or anyone else. No lawyer should fear that she will be punished, or perhaps even fired, for zealously representing her client. The defense attorney should be encouraged to pursue every possible means of achieving her client's best interest.

Each of us has much work to do. Whether we are defenders, or prosecutors, or judges, or professors, or law students, or lawyers who are not directly involved in the criminal justice system, we all have an obligation. We must lobby our legislators and our policymakers to provide adequate funding and training for defenders of the poor, and to assure their independence. Each of us should pledge to make the thirty-fifth anniversary of *Gideon* a celebration, and not just a commemoration. Let's all pledge to make the dream of *Gideon* a reality. Thank you.

PROFESSOR WILSON: I want to thank all of our panelists this afternoon. This has been a wonderful afternoon. It has been my deep honor to be a part of these proceedings. On behalf of the Washington College of Law, I want to again thank the Consortium, the firm of Arnold & Porter, and especially Justice Brennan for your attendance this afternoon, and all of our other guests. This is the end of our session this afternoon, and I would like to invite our invited guests to attend a reception in Mary Graydon Center across the Quad. Thank you very much for your attendance.